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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

BONNIE MCELRATH,

Plaintiff,

v.

FISH RITE, INC, an Oregon Corporation,  
JAMIE DORSEY, SR., and BARBARA  
DORSEY,

Defendants.

No. CV-08-1159-KI

REPLY IN SUPPORT OF MOTION  
TO DISMISS

**I. PLAINTIFF'S ADEQUATE STATUTORY REMEDIES  
PRECLUDE A WRONGFUL DISCHARGE CLAIM**

In *Farrimond v. Louisiana-Pacific Corp.*, 103 Or. App. 563, 567, 798 P2d 697 (1990),  
the plaintiff filed claims both under ORS 659.410, claiming she was terminated in retaliation for  
filing a workers' compensation claim, and for common law of wrongful termination. The Court

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1 of Appeals stated:

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3 Although the statute does not expressly state that it is intended to supersede the  
4 common law remedy, the legislature's adoption of *virtually all remedies* that  
5 would have been available at common law lead us to conclude that it intended the  
6 statutory remedy to be exclusive.

7 The Supreme Court in *Holien v. Sears, Roebuck and Co.*, 298 Or. 76, 97, 689 P.2d 1292  
8 (1984) placed emphasis on the inadequacy of the statutory remedy for discrimination on the basis  
9 of sex:

10 [T]he remedies provided by the statutes fail to appreciate the relevant dimensions  
11 of the problem. Reinstatement, back pay, and injunctions vindicate the rights of the  
12 victimized group without compensating the plaintiff for such personal injuries as  
13 anguish, physical symptoms of stress, a sense of degradation, and the cost of  
14 psychiatric care. Legal as well as equitable remedies are needed to make the  
15 plaintiff whole.

16 The adequacy of the statutory remedy is therefore material. The courts have allowed the  
17 tort of wrongful discharge solely in those cases where the plaintiff otherwise would not have had  
18 a remedy.

19 The cases cited by Plaintiff are distinguishable. In *Olsen*, the court found a clear legislative  
20 intent to allow both statutory and common law remedies. ORS 659.515(6) contains an explicit  
21 statement that the statute is “‘not intended to . . . [r]estrict or impair any judicial right of action  
22 an employee or an employer has under existing law.’ That language establishes that the legislature  
23 clearly and affirmatively expressed its intention that the statutory claim *not* supersede common-law  
24 claims.” 204 Or. App. at 16. That same clear legislative expression is not found in ORS  
25 659A.885.

26 Both *Palmer* and *Moustachetti* simply held that filing a workers' compensation claim does

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1 not preclude a wrongful discharge claim. Certainly the physical damage caused by an on the job  
 2 injury is different from the economic and emotional damage from the loss of a job. There is no  
 3 issue of workers' compensation exclusivity presented here. Similarly, the considerations of  
 4 collective bargaining and dispute resolution applicable to the public employee in *Shockey* are not  
 5 presented here. The presence of those contractual provisions (enhanced by statutory and public  
 6 policy considerations for public employees) do not preclude additional tort remedies. The same  
 7 result was reached in *Dunwoody v. Handskill Corp.*, 185 Or.App. 605, 612, 60 P.3d 1135 (2003):  
 8 "the existence of a contractual relationship does not, by itself, foreclose a plaintiff from bringing  
 9 a claim for common-law wrongful discharge." The tort is still allowed where the contractual  
 10 remedy does not "adequately redress the alleged injury." *Id.* at 614.

11 *Kofoid* simply held that a discharge "because of sex" without any more does not state a  
 12 common law actions for wrongful discharge. 68 Or. App. at 287. Resistance to sexual  
 13 harassment alone also does not create the tort of wrongful discharge. It is the absence of adequate  
 14 alternative remedies that has lead the courts to create that tort.

15 Whether a common-law remedy is available is further conditioned upon the  
 16 absence of adequate statutory remedies: "[W]here an adequate existing remedy  
 17 protects the interests of society . . . an additional remedy of wrongful discharge  
 18 will not be accorded." *Delaney*, 297 Or at 16; *Walsh v. Consolidated Freightways*,  
 19 278 Or. 347, 563 P2d 1205 (1977). Thus, the availability of an adequate statutory  
 20 remedy precludes an otherwise sufficient common-law wrongful discharge claim.  
*Holien v. Sears, Roebuck and Co.*, 298 Or. 76, 90-97, 689 P2d 1292 (1984);  
*Farrimond v. Louisiana-Pacific Corp.*, 103 Or. App. 563, 566, 798 P2d 697  
 (1990). *Dymock v. Norwest Safety Protective Equipment*, 172 Or.App. 399, 401,  
 405, 19 P.3d 934 (2001).

21 Notwithstanding Plaintiff's speculations regarding legislative intent, the difference in  
 22 statute of limitations for the two claims does not indicate that the statutory remedy is inadequate.

23 "Under Oregon law, an adequate existing *federal* remedy may bar a common law wrongful  
 24 discharge claim." *Draper v. Astoria Sch. Dist. No. 1C*, 995 F.Supp. 1122, 1127 (D.Or.1998),  
 25 citing *Walsh v. Consolidated Freightways, Inc.*, 278 Or. 347, 352, 563 P.2d 1205, 1208 (1977).  
 26

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1 The *Draper* court concluded that the plaintiff there had an adequate remedy under §1983 and  
 2 therefore declined to provide her with an additional, duplicative tort remedy. *Id.* Here, plaintiff  
 3 has adequate federal remedies under Title VII and therefore the duplicative wrongful discharge  
 4 remedy is unavailable.

5 The *Draper* court stated that *Shockey* “is not to the contrary.” 995 F.Supp. at 1132.  
 6 “[T]he court emphasized that it was addressing only the specific assignments of error asserted by  
 7 the city and did not necessarily agree that the employee had established all elements of his prima  
 8 facie case of wrongful discharge. *Shockey*, 313 Or. at 423 n. 7, 837 P.2d 505. The inference is that  
 9 the court may have been prepared to overturn the jury’s verdict on the wrongful discharge claim  
 10 . . . but stayed its hand because that argument was not preserved for appeal.” *Id.* “Thus,  
 11 *Shockey* is not particularly helpful.” *Id.* at 1134. The court concluded that the “School District  
 12 should be granted summary judgment on the wrongful discharge claim because plaintiff already  
 13 has adequate statutory and contractual remedies.” *Id.* at 1142.

## 14 II. PLAINTIFF’S STATUTORY CLAIM UNDER 15 ORS 659A.030 IS TIME BARRED 16

17 Plaintiff argues that ORS 174.120 and 187.010, relating to extension of time for deadlines  
 18 that fall on weekends and holidays, operate to save Plaintiff from the clear legislative mandate  
 19 found in ORS 659A.880 that BOLI “*shall*” issue a NRTS before the one year anniversary of  
 20 Plaintiff’s BOLI complaint. Those interpretive statutes may have their application to acts which  
 21 must be performed within a delimited period time, such as years (for statutes of limitations) or  
 22 days (for the perfection of liens). However, to apply them where there is a clear legislative  
 23 statement of intent that an act be performed “before the one year anniversary” (i.e., *before* July  
 24 5, 2008) would vitiate the clear language of the statute and “insert what has been omitted” in  
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1 violation of ORS 174.010. In other words, the legislature's use of the term "anniversary" points  
 2 to a specific day and not a period of time in which to accomplish an act.

3 Plaintiff does not address, and therefore appears to admit the authority of *Carsner v.*  
 4 *Freightliner Corp.*, 69 Or. App. 666, 671, 688 P.2d 398, *rev den* 298 Or. 334 (1984) ("the  
 5 commissioner **loses authority** over a complaint if she fails to act within a specified time."). If the  
 6 legislature intended to overrule *Carsner*, it would not have mandated that BOLI "shall" issue a  
 7 NRTS before the one year anniversary of Plaintiff's BOLI complaint. Neither has Plaintiff  
 8 identified any grounds for the application of the doctrine of equitable tolling.  
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10  
 11 For the foregoing reasons, Plaintiff's state statutory claim (ORS 659A.030) and wrongful  
 12 discharge claim should be dismissed.

13 DATED: December 5, 2008

14  
 15 JOSEPH M. CHARTER, P.C.

16  
 17  
 18 /s/ Joseph M. Charter

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